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NO. _____

IN THE

Supreme Court of the United States

October Term, 1962

DIXILYN DRILLING CORPORATION, *Petitioner*

-versus-

CRESCENT TOWING & SALVAGE COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on May 9, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is printed as Appendix "A" hereto, infra, page 34, and is not yet reported. The opinion of the United States District Court for the Southern District of Mississippi is printed as Appendix "B" hereto, infra, page 56 and is reported in 198 F. Supp. 788.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 9, 1962 (page 33, infra). The jurisdiction of this Court is invoked under 28 *U.S.C.* Section 1254(1).

QUESTIONS PRESENTED

1. Is an exception to be made to this Court's admiralty rule of law "based on public policy, invalidating contracts, releasing towers from all liability for their negligence."[1]

2. If such an exception is to be made to this *Bisso* rule, must the contract between the parties clearly express in unequivocal terms their intention for the craft being towed to indemnify the tower from the consequences of the tower's own negligence?[2]

STATEMENT

The Petitioner, Dixilyn Drilling Corporation, contracted with the Respondent, Crescent Towing & Salvage Company, to supply the necessary tugs to tow Petitioner's offshore drilling barge, JULIE ANN, down the Mississippi River from Vicksburg, Mississippi to New Orleans, Louisiana. In the course of the towage, one of the legs of the

[1]Rule quoted directly from **Bisso v. Inland Waterways Corporation**, 349 U.S. 85, at page 90, 99 L.Ed. 911, at page 917, 75 S.Ct. 629, 1955 A.M.C. 899, at page 904 (1955).

[2]The Court below held, contrary to eight of its earlier decisions, that such intention no longer had to be expressed in unequivocal terms, but where the contract of indemnity used "doubtful or ambiguous" terms, that the Court would look to the conferences and negotiations and correspondence and the attendant and surrounding circumstances leading up to the execution of the contract in an effort to try to determine the intention of the parties.

drilling barge struck the Natchez Bridge across the Mississippi River because of the inability of the tugs supplied by Crescent to stop the drilling barge above the bridge until such time as the legs on the drilling barge were lowered to the proper depth to clear the bridge. Crescent supplied three tugs to perform the towage, and it is undisputed that the navigation of the flotilla, consisting of these three tugs and the drilling barge, was completely controlled by Crescent's own pilot, a Captain Brechtel, and that Dixilyn's sole function was to lower the three legs on the drilling barge to the proper depth upon receiving instructions from Crescent's Captain Brechtel to do so.

The owners of the bridge sued Crescent to recover their damages and Crescent impleaded Dixilyn claiming that Dixilyn's negligence caused the damages and in the alternative, that if Crescent was negligent and therefore liable to the bridge owners that Dixilyn had agreed to indemnify Crescent for the consequences of Crescent's own negligence.

A brief description of what transpired up to the time of the damage before stating what the District Court held will probably be helpful to the Court.

In order to navigate the drilling barge under the Natchez Bridge, Crescent planned to turn the flotilla around so that it would be headed up the river in order that the stern of the tug boats and the JULIE ANN would pass under the Natchez Bridge first. Above the bridge, Crescent's Captain Brechtel was to stop the flotilla completely, give the order to lower the legs to Dixilyn's personnel and hold the flotilla in its stopped position at a point well above the bridge until the necessary depth of the legs in the water had been obtained. Crescent's Captain Brechtel's navi-

gational plan called for the lowering of the legs of the JULIE ANN to a depth of fifty-five feet in the water and was to be done in two stages. The legs were first lowered to thirty-five feet at a distance approximately a mile to a mile and a quarter above the bridge. Crescent's Captain Brechtel did not lower the legs to the full fifty-five feet at this time, because of a rock shelf about fifteen hundred feet upstream from the Natchez Bridge which made out from the Mississippi shore, and he did not want to risk damage to the flotilla by taking it across this rock ledge with fifty-five feet of draft on the legs. The decision not to lower the legs to fifty-five feet at the time they were initially lowered to thirty-five feet was made by Crescent's Captain Brechtel as the navigator of the flotilla. After crossing this rock ledge, Crescent's Captain Brechtel planned to stop the flotilla completely and lower the legs to the desired fifty-five feet. As this would be an additional twenty feet that the legs would have to be lowered into the water, and as the legs lowered at a constant rate of approximately one foot per minute, this meant that Crescent's Captain Brechtel contemplated holding the flotilla completely stopped after crossing this rock ledge some fifteen hundred feet above the bridge a minimum of twenty minutes while the legs were lowered. After holding the flotilla in this position while the legs were lowered to the contemplated depth, once the desired depth on the legs had been obtained, Crescent's Captain Brechtel then planned to permit the barge to proceed down through the Natchez Bridge. Obviously the key to the successful consummation of this plan for navigating the drilling barge under the Natchez Bridge was the complete stopping of the flotilla and the holding of it in substantially a fixed position above the bridge for approximately twenty min-

utes while the last twenty feet of the legs on the JULIE ANN were lowered into the water. The tugs supplied by Crescent were never able to stop the flotilla after it crossed the rock ledge and the bridge was damaged because the flotilla reached the bridge before enough time had elapsed for the legs to be lowered the last twenty feet.

The District Court found as a fact that Crescent's navigational plan failed and the bridge was damaged solely because of the negligence of Crescent and the unseaworthiness of Crescent's Tug ORLEANS. The District Court found Crescent negligent in five particulars:

1. Because Crescent failed to supply tugs with sufficient horsepower to completely stop the tow and hold it in the water long enough for the legs on the drilling barge to be lowered to the depth necessary to clear the bridge. (R. 600; infra page 68).

2. Because Crescent furnished the Tug ORLEANS with a defective engine so that it was not able to exert full power because its engine failed above the bridge at the crucial moment. (R. 600, 601; infra, page 69).

(Note: While not expressly stated in the District Court's opinion, there can be no dispute as a matter of law the Tug ORLEANS was unseaworthy because of this defective engine.)

3. Because Crescent's Captain Brechtel did not completely stop the flotilla immediately after crossing the rock ledge so that the legs could be lowered to the contemplated depth. (R. 601; infra, page 69).

4. Because Crescent's Captain Brechtel did not make a test of the holding power of the tugs with the legs

lowered to the comtemplated depth well above the bridge before attempting to navigate the flotilla under the bridge. (R. 601; infra, page 69).

5. Because Crescent's Captin Brechtel failed to notify Dixilyn's employee at an earlier time to start lowering the legs. (R. 601; infra, page 69).

The District Court expressly found that Dixilyn was not negligent to any extent and fully performed its function of lowering the legs in connection with Crescent's unsuccessful attempt to navigate the flotilla under the Natchez Bridge.

Having found that it was solely the negligence of Crescent and the unseaworthiness of Crescent's Tug ORLEANS which caused this damage, the District Court then considered whether or not the contract required Dixilyn as owner of the craft towed to indemnify Crescent as the tower for the consequences of Crescent's own negligence. The District Court, following the rule which had been stated by the Court of Appeals below on eight separate occasions, held that the contract did not express in clear and definite terms that Dixilyn intended to indemnity Crescent for the consequence of Crescent's own negligence.[3]

Since the District Court held that the contract did not evidence the intention of the parties in these unequivocal

[3]The District Court cited and relied on **Batson-Cook Company v. Industrial Steel Erectors**, 257 F.2d 410 (C.A. 5, 1958), and **Standard Oil Company of Texas v. Wampler**, 218 F.2d 768, (C.A. 5, 1955) in both of which the Court of Appeals below had expressly held that indemnity agreements are strictly construed against the indemnitee and that contracts would not be so construed unless the indemnitor's obligation to protect the indemnitee from his own negligence was expressed in unequivocal terms.

terms, it did not reach the question of whether or not such a contract relieving Crescent as the tower of the barge of liability for its own negligence was invalid under the rule announced by this Court in the *Bisso*[4] and *Winding Gulf*[5] cases.

Upon Crescent's appeal from the judgment of the District Court, the Court of Appeals below reversed the District Court on the basis of the contractual agreement between the parties. In so doing, the Court of Appeals held:

> 1. That even though the language of the contract between the parties relating to indemnity was "doubtful and ambiguous" and even though an intention on the part of Dixilyn to indemnify Crescent was not stated in the contract in unequivocal terms as the Court of Appeals below had heretofore required, that by looking to the correspondence, conferences and circumstances surrounding the execution of the contract, it was the intention of the parties that Dixilyn indemnify Crescent for the consequences of Crescent's own negligence. This is exactly opposite to the result reached by the District Court.
>
> 2. Having concluded not from the terms of the contract itself, but from extraneous circumstances that Dixilyn as owner of the towed barge had agreed to indemnify the tower for the consequences of the tower's own negligence, the Court of Appeals below then held that such a contract was not controlled by

[4]**Bisso v. Inland Waterways Corporation,** 349 U.S. 85, 99 L.Ed. 911, 75 S.Ct. 629, 1955 A.M.C. 899 (1955).

[5]**Boston Metals Company v. SS WINDING GULF,** 349 U.S. 122, 99 L.Ed. 933, 75 S.Ct. 649, 1955 A.M.C. 927 (1955).

the rule announced by this Court in the *Bisso* and *Winding Gulf* cases that contracts relieving towers of liability for their negligence were invalid because contrary to public policy. The Court of Appeals below thus attempted to create an exception to this Court's public policy rule as announced in the *Bisso* and *Winding Gulf* cases.[6]

3. The Court of Appeals then considered another question not reached by the District Court with respect to the measure of damages to which Crescent might be entitled under the indemnity agreement. The Court of Appeals below again refused to follow one of its earlier decisions[7] and held that Crescent was entitled to reimbursement for the full amount of damages paid to the bridge rather than the damages actually sustained by Crescent which was limited solely to the cost of insurance then in effect protecting Crescent against any and all losses such as this.

REASONS FOR GRANTING THE WRIT

I.

The holding of the Court of Appeals that Dixilyn as owner of the towed drilling barge validly contracted to indemnify Crescent's tugs for all liability to third parties for Crescent's own negligence is directly in conflict with the decisions of this Court in:

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[6]**Bisso v. Inland Waterways Corporation,** 349 U.S. 85, 99 L.Ed. 911, 75 S.Ct. 629, 1955 A.M.C. 899 (1955); **Boston Metals Company v. SS WINDING GULF,** 349 U.S. 122, 92 L.Ed. 933, 75 S.Ct. 629, 1955 A.M.C. 927 (1955).

[7]**Standard Oil Company of Texas v. Wampler,** 218 F.2d 768 (C.A. 5, 1955).

Bisso v. Inland Waterways Corporation, 349 U.S. 85, 99 L. Ed. 911, 75 S. Ct. 629, 1955 A.M.C. 899 (1955)

and

Boston Metals Company v. SS WINDING GULF, 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649, 1955 A.M.C. 927 (1955).

In the landmark *Bisso* case, this Court specifically held that a contract releasing a tower from all liability for its negligence which resulted in damage to the tow itself was invalid because contrary to public policy. In so doing, this Court stated that because of "judicial history and cogent reasons in support of a rule outlawing such contracts we now, despite past uncertainty and difference among the circuits, accept this as the controlling rule."[8]

On the same day in the *Winding Gulf* case,[9] this Court made it perfectly plain that a contract relieving a towing tug of all liability for its negligent navigation was contrary to public policy not only insofar as damages to the tow was concerned, but also with respect to damages of third parties caused by the negligence of the towing tug.

In declaring that a towing tug could not contract away its liability for its own negligence, this Court made it perfectly clear that there were two main reasons for the creation and the application of this rule. It stated them thusly:

". . . (1) To discourage negligence by making wrongdoers pay damages, and

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[8]**Bisso v. Inland Waterways Corporation**, 349 U.S. 85, at page 90, 99 L.Ed. 911, at page 917, 75 S.Ct. 629, 1955 A.M.C. 899, at page 904 (1955).

[9]**Boston Metals Company v. SS WINDING GULF**, 349 U.S. 122, 99 L.Ed. 933, 75 S.Ct. 649, 1955 A.M.C. 927 (1955).

> (2) To protect those in need of goods or services from being overreached by others who have power to drive hard bargains."[10]

Notwithstanding this rule of law based on public policy, the Court of Appeals in the present case has created an exception to this public policy rule and in doing so relied primarily on some dictum contained in this Court's decision in *Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation,* 360 U.S. 411, 3 L. Ed. 1334, 79 S. Ct. 1210 (1959), in which this Court had under consideration a clause relieving a tower of liability for its negligence which had been filed as a part of a tariff with the Interstate Commerce Commission. After holding that such a clause in a tariff filed with the Interstate Commerce Commission should not be declared invalid without the Interstate Commerce Commission having had an opportunity to express its views, this Court indicated that the rule of *Bisso* might call for modification where an effective regulatory scheme controlled the liabilities of tug and tow. This Court then stated:

> "If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards uncertain, it may be that in an area where Congress has not, expressly or by fair implication, declared for a particular result, the federal courts should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances."[11]

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[10]**Bisso v. Inland Waterways Corporation,** 349 U.S. 85, at page 91, 99 L.Ed. 911, at page 918, 75 S.Ct. 629, 1955 A.M.C. 899, at page 905 (1955).

[11]**Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation,** 360 U.S. 411, at page 419, 3 L.Ed. 1334, at page 1341, 79 S.Ct. 1210 (1959).

Apparently believing that this language meant that exceptions were to be made to the *Bisso* rule in certain circumstances, the Court of Appeals so held in this case when in fact the two conditions precedent to any such exception as stated by this Court in the *Southwestern Sugar & Molasses Company* case were not present. The two condition precedent to creating an exception to the *Bisso* rule as stated in the *Southwestern Sugar & Molasses* case were:

> 1. That the peculiar *hazards* involved in towing a barge supplied by the shipper *be great.*
>
> 2. That the *methods of guarding* against those great and peculiar hazards *be uncertain.*[12]

[12] In both of the other cases cited and relied on by the Court of Appeals below in support of the exception if created to this Court's **Bisso** rule, the hazards excepted met both these tests—in both the hazards were great and the method of guarding against them was not only uncertain but non-existent if the barges were to be towed at all.

In the decision rendered before **Bisso** by the Second Circuit, **North River Barge Line v. Chile S.S. Co.**, 213 F.2d 882 (1954), the great hazard was ice and the only method of guarding against it was not to tow the barge at all. Nevertheless, the tower did not seek to avoid its liability otherwise for its own negligent towage and the contract expressly provided only that the tower would not be liable for towing the barge in the ice. This is a far cry from the complete exoneration from liability for its own negligence which Crescent has been given by the Court of Appeals below in the present case notwithstanding this Court's rule to the contrary in **Bisso.**

Likewise, in the District Court case, **Chile Steamship Company v. The Justine McAllister,** S.D. N.Y., 168 F.Supp. 700 (1958), the great hazard was ice and there was in fact no method of guarding against the hazard of ice. Here again the tower assumed all liabilities except for damages due to ice and the contract specifically so provided.

Whatever exception to **Bisso** might be justified where there is no method of guarding against a hazard such as ice, is of no significance here where by the simple method of supplying tugs with sufficient horsepower to stop and control the tow, Crescent would have completely eliminated the hazard which resulted in the damage to the bridge.

Neither of these factors is present in the instant case, for while this offshore drilling barge may have been unusual in its characteristics because of its legs, and therefore may have presented a peculiar hazard[13] in navigating underneath the bridges on the Mississippi River, this hazard was not great, and certainly was not a hazard in which the method of guarding against it was uncertain. The hazard was not great because by a simple adjustment in the position of the legs by either raising or lowering them to a proper depth in the water all bridges could be navigated with safety. And the method of guarding against the hazard of these legs on this drilling barge striking a bridge was not uncertain. The method of guarding against this hazard, however peculiar it might have been, was both certain and simple indeed—Crescent simply had to supply tugs with sufficient horsepower to hold the drilling barge stationary in the river while the legs were lowered to the depth that would permit them to clear the bridges. Certainly there is nothing uncertain as to the method that should have been employed by Crescent to completely eliminate any danger of the drilling barge striking a bridge. Sufficient horsepower was all that was required, and as the District Court found, Crescent wholly failed in its contractual obligation to provide a sufficient amount of horsepower to guard against this hazard. By simply adding an additional tug or using tugs of greater horsepower than

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[13]Even that it was a peculiar hazard, however, is extremely doubtful for in every passage under a bridge by any tug and tow the risk and possibility of a collision with the bridge is an ever present hazard.

It can hardly be said that the hazard here is any more peculiar than that existing when a single river tow boat navigates 30 or 40 barges at one time through a bridge such as this or when one or more tugs navigate a large deep sea vessel without its own power under a bridge such as this.

those supplied, Crescent had the certain means of eliminating all possibility of an accident ever occurring such as is involved in this case.[14]

But this is not the only certain and simple method which Crescent had of eliminating this hazard, for by the simple expedient of testing the ability of the three tugs which it supplied to hold the drilling barge while the legs were lowered to the desired depth before it ever approached the bridge, Crescent could easily have ascertained that the three tugs it had supplied were not of sufficient horsepower to hold the barge while the legs were lowered. The District Court expressly held that Crescent negligently failed to make such a test above the bridge where there was adequate water for this purpose and where there would have been no danger of damage to anyone or anything in the process of making the test.

Instead of adopting these two certain and simple methods of guarding against the hazard of one of the drilling barge's legs coming in contact with the bridge, Crescent negligently failed to make any such test to determine the adequacy of the horsepower supplied and negligently supplied an inadequate amount of power to perform the towing contract which it undertook.

The very essence of the contract which Crescent made with Dixilyn was the supplying of sufficient power to perform the towing operation without damage to the drilling barge or to the bridges across the river. It not only negligently failed to employ these two certain and simple

[14]Crescent supplied three tugs with engines that had a total of 6,375 horsepower (TOLTEC with 3,975 horsepower, OUACHITA with 1,800 horsepower and ORLEANS with 600 horsepower). Before taking the drilling barge under the Baton Rouge Bridge further down river, Crescent added a fourth tug with an additional 1,500 horsepower.

methods of guarding against this particular hazard, but it was also negligent in supplying the Tug ORLEANS in an unseaworthy condition because of its defective engine which failed above the bridge at the crucial moment.

Rather than creating an exception to the *Bisso* rule when neither of the conditions precedent to such an exception as set out by this Court in *Southwestern Sugar & Molasses* are present, this is a classic case for the application of the public policy rule of *Bisso*, and particularly so because such a public policy rule was felt necessary by this Court primarily to discourage negligence by making wrongdoers pay damages in these days when "the dangers of modern machines makes it all the more necessary that negligence be discouraged."[15]

The negligence of Crescent in furnishing an unseaworthy tug, in supplying insufficient power, and in failing to make a test to determine if the power it had supplied was sufficient, is a flagrant, yes, almost willful disregard of the contractual obligations which it assumed as a matter of law when it agreed to tow the barge. Whatever the economic factors may be, and regardless of how many other towing concerns may have been interested in performing this towage for Dixilyn, the fact remains that the *Bisso* rule was clearly and plainly designed to discourage and do away with the very kind of negligence of which Crescent was guilty in this case, and Crescent's attempts to contract away its liability for its own negligence must be declared invalid as contrary to public policy.

In the offshore drilling operations off of the coast of Louisiana and Texas, there are literally hundreds and perhaps thousands of contracts for towing services of various

[15]**Bisso v. Inland Waterways Corporation**, 349 U.S. 85 at page 91, 99 L.Ed. 911, at page 918, 75 S.Ct. 629, 1955 A.M.C. 899, at page 905 (1955).

kinds in substantially all of which there is some form of an indemnity agreement or release tower's clause. Until the decision of the Court of Appeals below in this case, these clauses were invalid, but the Court below has now created great uncertainty in the law relating to towage contracts by creating an unwarranted exception to this Court's public policy rule of *Bisso*. It is respectfully submitted that where a rule of law is founded squarely and steadfastly on public policy as is true of the *Bisso* rule, that the exceptions to this rule must be few and far between and that any such exceptions should be expressly reviewed and approved by this Court. Particularly is such a review indicated in this case where neither of the conditions precedent to such a possible exception as stated by this Court in *Southwestern Sugar & Molasses* are present. The hazards were not great, and the method of guarding against the hazards were not uncertain, but simple indeed—Crescent simply had to supply sufficient power to control the drilling barge at all times. Certainly a tower such as Crescent here should not be permitted to contract away its liability for negligently failing to supply enough power to perform the very towing operations which were the essence of its contractual obligation.[16]

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[16] In this respect it is strikingly similar to the essence of the contract which this Court relied on to imply as a matter of law a duty on a stevedoring contractor to indemnify the shipowner for damages arising out of the failure of the stevedoring contractor to perform its stevedoring services in a reasonably safe and workmanlike manner. See **Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.**, 350 U.S. 124, at page 133, 100 L.Ed. 133, at page 142, 76 S.Ct. 232 (1956).

If the law implies indemnity as was done in **Ryan**, for even stronger reasons an exception to **Bisso** should not be made to permit a tower to contract away its liability where it has negligently failed to perform its duty which is also the very essence of the towing contract.

II.

The holding of the Court of Appeals that since the indemnity contract did not express plainly and unequivocally an intention that Dixilyn would indemnify Crescent for the consequences of Crescent's own negligence, but rather was doubtful or ambiguous on this point, that the Court would then look to the correspondence and meetings and circumstances leading up to the exection of the contract to ascertain the intention of the parties, is directly in conflict with *two* recent decisions of this Court and with *eight* previous decisions of the Court of Appeals below.

The two decisions of this Court are:

> *Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 3 L. Ed. 2d 820, 79 S. Ct. 766 (1959);
> *Boston Metals Co. v. THE WINDING GULF*, 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649 (1955).

Quoting the rule directly from THE WINDING GULF case, this Court stated in *Herd & Co.*:

> "Similarly, contracts purporting to grant immunity from, or limitation of, liability must be strictly construed . . . for they 'are not to be applied to alter familiar rules visiting liability upon a tort feasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.' "[17]

Prior to the present decision, what the law was on this point "not only generally, but . . . in the Fifth Circuit as well,"[18] had been plainly reaffirmed by the Court of

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[17] **Herd & Co. v. Krawill Machinery Corp.**, 359 U.S. 297, at page 305, 3 L.Ed. 820, at page 825, 79 S.Ct. 766 (1959).

[18] **Batson-Cook Company, Inc. v. Industrial Steel Erectors**, 257 F.2d 410, at page 412 (C.A. 5, 1958).

Appeals below only four short years ago when it said:

> ". . . that while it need not be done in any particular language or form, unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence."[19]

That such an intention to indemnify a party against its own negligence had to be unequivocally expressed in the contract itself was first enunciated by the Court of Appeals below in 1935,[20] was reaffirmed twice in 1950,[21] once in 1951,[22] once in 1953,[23] and twice in 1955,[24] prior to its decision in *Batson-Cook* in 1958 from which the rule has heretofore been quoted. When the language of the contract in this case is compared with the contractual language of those eight cases, it is abundantly clear that the written contract in this case does not meet the rule of those eight cases that the intention to indemnify Crescent against its own negligence must be unequivocally

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[19]**Batson-Cook Company, Inc. v. Industrial Steel Erectors**, 257 F.2d 410, at page 412.

[20]**Southern Bell Telephone & Telegraph Co. v. Mayor and Board of Aldermen of City of Meridian, Mississippi**, 71 F.2d 983 (C.A. 5, 1935).

[21]**Martin v. American Optical Company**, 184 F.2d 528 (C.A. 5, 1950); **Halliburton Oil Well Cementing Co. v. Faulk**, 180 F.2d 79 (C.A. 5, 1950).

[22]**W. C. Shepherd Co. v. Royal Indemnity Co.**, 192 F.2d 710 (C.A. 5, 1951).

[23]**Thomas v. Atlantic Coastline Railroad Company**, 201 F.2d 167 (C.A. 5, 1953).

[24]**Standard Oil Company of Texas v. Wampler**, 213 F.2d 768 (C.A. 5, 1955); **Alabama Great Southern Railroad Company v. Louisville & Nashville Company**, 224 F.2d 1 (C.A. 5, 1955).

expressed in the plainest of terms. The only thing in writing evidencing any intention of Dixilyn to indemnify Crescent for any purpose in this case is contained in the following language:

> "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us (Crescent) from any liability for account of your underwriters and that any damage claims urged by third parties, as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and the account of your underwriters." (Parenthetical expression added)[25]

Realizing that this language could not meet the unequivocal terms required by its eight previous decisions,[26]

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[25]All of the contract which was in writing in this case is quoted in the opinion of the Court of Appeals and consists of Crescent's letter of December 23, 1957 with the sentence eliminated as shown in the Court's opinion. See page 42, infra. The earlier letter from Crescent of December 19, 1957, with its attached Tower's Release Clause was rejected by Dixilyn.

[26]The contractual language in this case purported to **"release and relieve"** Crescent **"from any liability"** and from **"any damage claims urged by third parties."**

A brief look at the contractual language construed by the Court of Appeals in these eight earlier cases as not being sufficiently clear to require one party to indemnify another party for the consequences of its own negligence will quickly demonstrate why the Court of Appeals below had to make such a startling reversal in its approach to these indemnity contracts if it was to reach the result it did in this case:

1. In **Batson-Cook**, the indemnity clause provided for indemnity against **"any and all losses"** and **"to defend any suit"** and **"to pay all damages"**. The Court of Appeals below held that this language was not sufficiently clear to show the intent of the indemnitor to indemnify the indemnitee against losses arising out of the indemnitee's own negligence and expressly said that the word "all" did not include lia-

the Court of Appeals below sought to avoid the rule of these eight decisions by stating that the holdings of those eight cases simply meant the failure to refer specifically to

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bilities arising out of the indemnitee's own negligence. 257 F.2d 410 (C.A. 5, 1958).

2. In the **Wampler** case, the language employed was against "any" loss, and it was held that it failed to meet the requirement of the law that an agreement to indemnify or insure a party against its own negligence had to be expressed in unequivocal terms. 218 F.2d 768 (C.A. 5, 1955).

3. In the **Shepherd** case, the language employed in the contract was to save harmless the surety from **"all costs, expense, loss or damage"**, and to repay the surety **"all monies expended"** under the contract. The Court of Appeals held that this language could not be construed to indemnify the surety against losses resulting from its own wrongdoing. 192 F.2d 710 (C.A. 5, 1951).

4. In the **Martin** case, the contract provided that the lessor release the lessee from **"any and all damages"**. The Court of Appeals below held that this language did not require the lessee to indemnify the lessor against the lessor's own negligence, since there was no unequivocal expression of such intention. 184 F.2d 528 (C.A. 5, 1950).

5. In the **Halliburton Oil Well** case, the contract provided that the indemnitee **"shall not be responsible for damages or losses of any kind whatsoever . . . . whether resulting from the acts or omissions"** of the indemnitee. The Court of Appeals below held this language was not sufficient to require the indemnitor to pay for the indemnitee's negligence because such obligation had not been expressed in the contract in "unequivocal terms." 180 F.2d 79, at page 81 (C.A. 5, 1950).

6. In the **Southern Bell Telephone Company** case, the indemnitor assumed **"all liabilities"** and agreed to indemnify the indemnitee against **"any and all loss or damage"**. In holding this language not sufficiently clear to require the indemnitor to pay for the indemnitee's negligence the Court of Appeals below said:

> "It is well settled that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts, where such intention is not expressed in unequivocal terms." 74 F.2d 983, at page 984 (C.A. 5, 1935).

7. In the **Alabama Great Southern Railroad Company** case, the contract provided for indemnity against **"any loss**

negligence in an indemnity agreement was only some evidence of an intention not to indemnify against such losses. In the present case, the Court of Appeals below thus took the absence of an expression in unequivocal terms simply as one of the factors to be considered in determining the intent of the parties to a contract of indemnity, and proceeded to create for the Fifth Circuit an entirely new rule—that if an indemnity agreement does not cover the indemnitee's negligence plainly and unequivocally as had previously been required by that Court, that the Court would then consider the negotiations between the parties, the correspondence and other circumstances surrounding the consummation of the contract in an attempt to ascertain if the parties intended to do that which they did not say. What a tremendous and fantastic and unjustified reversal of a well-established rule of law this was!

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in whatever manner the same may be caused or occasioned, whether by or through the negligence" of the indemnitee "or otherwise". The Court of Appeals below held that this specific language although it referred to negligence was not sufficiently clear to cover "all losses" but was only sufficiently clear to require the indemnitor to pay for the indemnitee's simple negligence, and this Court expressly held that this language "could not properly be construed as intended to extend, or extending, to damage occasioned by willful conduct or wanton negligence" on the part of the indemnitee. 224 F.2d 1, at page 4 (C.A. 5, 1955).

8. In the **Thomas** case, the indemnity clause in the contract provided that the lessor would be indemnified against **"any and all" claims "whether the same is the result of fire caused by negligent emission of sparks from the locomotive engines of lessor, or otherwise, however resulting."** The Court of Appeals below also held in this case that this language was sufficiently clear to cover only the simple negligence of the lessor, but was not sufficiently clear or explicit to evidence an intention that the lessee pay for the claims resulting from the lessor's willful or wanton negligence. 201 F.2d 167 (C.A. 5, 1953).

The result is all the more shocking and inexplicable when two of the same panel of three judges[27] who decided the present case had only fourteen days before expressly stated "the general rule that a contract will not be construed to provide for indemnification of the indemnitee for losses due to his own neglect, unless the intention to do so is expressed in unequivocal terms."[28] Thus did the same panel of Circuit Judges reaffirm the general rule enunciated by the eight previous decisions of this Court. Yet in the present case the same Circuit Judges hold that if the intention to indemnify is not in fact expressed in the unequivocal terms in the contract, then the Court will examine extraneous evidence in an attempt to determine whether the parties had actually intended to do that which they did not express in the unequivocal terms required by this Court's earlier decisions.

It is impossible to understand how the same panel of Judges sitting on the same Court can in the space of fourteen days reaffirm the general rule and then completely emasculate it by saying that if the parties do not comply with the rule, the Court will consider extraneous circumstances to see if, in fact, the parties intended their silence to be equivalent to what the Court had said so many times before had to be expressed in unequivocal terms in the contract.

What an incongruous and chaotic result this is! It is respectfully submitted that the rule announced by the Court of Appeals below in the present case which requires a Court to look into the negotiations, correspondence, etc.

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[27]Chief Judge Tuttle and Circuit Judge Wisdom. Circuit Judge Rives who wrote the opinion in the present case dissented but on other grounds.

[28]**Halliburton Company v. Norton Drilling Company**, 302 F.2d 431, at page 436 (April 25, 1962).

leading up to the execution of an indemnity contract, in an effort to determine whether one party agreed to indemnify another party for its own negligence, is unsound, unjust, impractical and fosters great uncertainnty in the interpretation of contracts which leads inevitably to endless litigation in an attempt to ascertain the intention of the parties which should have been plainly stated in the contract itself.

The sound administration of justice requires that when the purpose of a contract is to impose the extraordinary liability of the indemnitee's negligence on the indemnitor, that this purpose and intention be spelled out in unmistakable terms in the contract itself. It is only by such a requirement that contracting parties, their attorneys and the Courts can know in situations such as this what unusual liabilities are being assumed, if any, by the various parties.

If an exception is to be created to the *Bisso* rule that a towing company cannot contract away its liability for negligence, it is respectfully submitted that contracting parties in the position of Dixilyn in this case are at least entitled to the protection of the rule which requires that contracts specifically provide in the plainest of language that the towed barge is assuming the tower's liability for the tower's negligence or the unseaworthiness of the tower's vessels. Certainly this is not too much to ask of a party who drafts the contract such as Crescent did in this case. The need for this to be plainly expressed is further emphasized when it is remembered that the basic rule of *Bisso* makes such provisions contrary to public policy and only exceptional circumstances may possibly create an exception to this public policy rule. Clearly if the liability is one that cannot be passed on unless an ex-

ception to the public policy rule of *Bisso* is made, it is all the more reason why such liability for negligence should not be passed from one party to another without the written contract expressing it in the plainest of terms.

III.

The holding of the Court of Appeals below that the contract did not have to provide in unequivocal terms that the drilling barge agreed to indemnify the towing tugs for the consequences of the tugs' own negligence is directly in conflict with the following decisions of other Courts of Appeals:

First Circuit:

Turner Construction Company v. W. J. Halloran Steel Erection Co., 240 F. 2d 441 (1957).

Second Circuit:

Mostyn v. Delaware, L. & W. R. Co., 160 F. 2d 15 (1947), cert. denied 332 U.S. 700, 92 L. Ed. 318, 68 S. Ct. 82 (1947).

Miller v. Pennsylvania Railroad Company, 236 F. 2d 295 (1956).

Seventh Circuit:

Chicago & N.W. Ry. Co. v. Chicago Packaged Fuel Company, 195 F. 2d 467 (1952), cert. denied 344 U.S. 832, 97 L. Ed. 648, 73 S. Ct. 39 (1952).

Eighth Circuit:

Ocean Accident & Guarantee Corp. v. Jansen, 203 F. 2d 682 (1953).

Ninth Circuit:

Wallace v. U. S., 18 F. 2d 20 (1927).

All of the above cases expressly hold that before a contract will be construed to require the indemnitor to indemnify the indemnitee for the consequences of the indemnitee's own negligence, that such an intention must be stated in unequivocal terms in the contract itself.

IV.

The Court of Appeals construed the contract in this case in complete and utter disregard of two well-established rules of law in interpreting indemnity clauses in contracts. These two rules which are so well settled that the citation of authority is unnecessary, are:

1. That a contract generally, and specifically a contract to indemnify, is strictly construed against the party who drafts it.

2. That a contract of indemnity, other than an insurance contract, is to be strictly construed in favor of the indemnitor.

Without dispute the language employed in the letter constituting the contract in this case is that of Crescent as supplier of the tugs and, in fact, was language drafted by its own skilled admiralty counsel with full knowledge of the eight previous decisions of the Court of Appeals below which had expressly held that to pass on the unusual liability of the tug's negligence to its tow that the contract had to express it in the plainest of language. Rather than strictly construing the contract drafted by Crescent's own admiralty counsel, the Court of Appeals does not construe the language at all, but holds that the language used by Crescent's counsel is not what the law required, and is in fact doubtful and ambiguous as to the intention

of the parties. Instead of applying the general rule that no indemnification was intended because of this doubt and ambiguity, the Court of Appeals below proceeds to look to extraneous evidence completely outside the contract in an attempt to determine the intention of the parties. It is impossible to imagine a more liberal construction of a contract in favor of the party who drafted it rather than against it as the law requires than has been made by the Court of Appeals in this case.

But the error of the Court of Appeals below does not stop here, but rather it is compounded by its refusal to follow still another tenet of contractual interpretation, a rule that it had firmly reiterated itself on five separate occasions since 1947. This is the rule of contractual construction of indemnity agreements that provides that they must be construed strictly in favor of the indemnitor, in this case the drilling barge being towed. In 1947 the Court of Appeals below stated this rule thusly:

> "On the other hand, it is certainly the general rule, that, where the indemnity is not contracted for from an insurance company whose business is to furnish indemnity for a premium and where indemnity is the principal purpose of the contract; but from one not in the indemnity business, and as an incident of a contract whose main purpose is something else, such as a sub-construction contract, the indemnity provision is construed strictly in favor of the indemnitor."[29]

On four subsequent occasions, the Court below has reaffirmed this rule of construction of indemnity contracts:

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[29]**Employers Casualty Company v. Howard P. Foley Company**, 158 F.2d 363, at page 364 (C.A. 5, 1947).

Halliburton Oil Well Cementing Company v. Paulk, 180 F. 2d 79 (C.A. 5, 1950)[30]

Martin v. American Optical Company, 184 F. 2d 528 (C.A. 5, 1950)[31]

Thomas v. Atlantic Coast Line Railway Company, 201 F. 2d 167 (C.A. 5, 1953)[32]

Standard Oil Company of Texas v. Wampler, 218 F. 2d 768 (C.A. 5, 1955)[33]

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[30]The Court said in part:

"In considering this claim of indemnity we must bear in mind the rule that indemnity agreements are strictly construed against him who claims to be an indemnitee. . . . This is particularly true where the result would be to indemnify against one's own negligence, and it will not be so construed unless such obligation is expressed in unequivocal terms." 180 F.2d 79, at page 84 (C.A. 5, 1950).

[31]The Court stated:

"This Court has had recent occasion to point to the strictness with which indemnity provisions are construed in favor of the indemnitor." 184 F. 2d 528, at page 529 (C.A. 5, 1950).

[32]The Court reiterated its earlier holding in **Employers Casualty Company v. Foley**, 158 F.2d 363 (C.A. 5, 1947), in almost identical language:

"It is the general rule that where the indemnity is not contracted for from an insurance company whose business it is to furnish indemnity for a premium under a contract, but is from one not in the indemnity business and is an incident of a contract whose main purpose is something else, the indemnity provision is construed strictly in favor of the indemnitor." 201 F.2d 167, at page 169 (C.A. 5, 1953).

[33]The Court stated in part, as follows:

"On briefs Appellants 'recognized the rule that indemnity agreements are strictly construed against him who claims to be an indemnitee, and that is particularly true where the result would be to indemnify against one's own negligence, and that it will not be so construed unless such obligation is expressed in unequivocal terms.' But, Appellants say, 'the intention of the party to indemnify against the indemnitee's negligence need not be expressly stated in the contract pro-

Contrary to the rule it had expressly stated on no less than five separate occasions since 1947, the Court of Appeals below not only did not strictly construe the indemnity provisions in the contract in favor of the indemnitor (the vessel being towed), but in fact did not construe the indemnity provisions of the contract at all, but rather attempted to ascertain the intention of the parties by looking to the conferences, correspondence and other surrounding circumstances connected with the contractual agreement. This it did without any reference whatsoever to the rule it had so often stated that a contract of indemnity had to be construed strictly in favor of the indemnitor.

When these two tenets of contractual construction, which are particularly appropriate when an unusual liability such as the negligence of the indemnitee is sought to be passed on to another, are applied to the contractual language used in this case by Crescent's own counsel, the error of the Court of Appeals below is as plain and unequivocal as the language it had heretofore required in an indemnity contract before it would pass on the liability of an indemnitee for its own negligence to an indemnitor.

V.

The holding of the Court of Appeals with respect to the amount of damages to which Crescent is entitled if Dixilyn is ultimately held liable to indemnify Crescent for Crescent's own negligence, is in direct conflict with that same Court's earlier decision in *Standard Oil Com-*

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vided otherwise clearly appears in the language used.' There is nothing wrong with Appellants' statement of the rules. The difficulty is that, construing the contract strictly, the indemnity claim is not expressed in unequivocal terms." 218 F.2d 768, at page 770 (C.A. 5, 1955).

pany of Texas v. Wampler; 218 F. 2d 768 (C.A. 5, 1955). In the present case the Court of Appeals held that Dixilyn was liable to Crescent for the full amount of damages paid by it to the owners of the bridge, whereas its previous holding in the *Wampler* case under identical circumstances required it to hold that Crescent's damages were only the premiums paid by Crescent for the insurance which covered the sums it had to pay in damages. While the Court of Appeals attempts to distinguish the *Wampler* case from the present case, it is a distinction without substance, for it is undisputed that Crescent's own regular insurance policies covered the damages it paid to the bridge and Crescent itself sustained no loss whatsoever other than the premiums which it had paid for the insurance for its tugs during the course of this operation.

It is respectfully submitted that an authoritative determination from this Court as to what is the proper measure of damages under these circumstances is urgently needed. The question here is not what will make Crescent and its insurance underwriters whole if Dixilyn must indemnify Crescent, but what sum of money is necessary to make Crescent alone whole for the damages paid to the bridge.

VI.

The questions presented on this application, and particularly the question whether an exception to the public policy rule of *Bisso* that contracts relieving a tower from liability for its own negligence are invalid, are of tremendous national importance. While this statement could have been made some ten or fifteen years ago purely on

the basis of the large amount of transportation upon the inland waterways and inland rivers of the United States, it is of even more significance and importance now with the vast amount of offshore drilling operations now taking place not only off the States bordering the Gulf of Mexico, but off the Pacific and Atlantic Coast States as well. In these offshore operations, the need for towing drilling rigs such as the one involved in this case as well as all other types of vessels from one offshore location to another is vast indeed. Notwithstanding the *Bisso* rule, as was true in this case, the towing companies almost uniformly and consistently place some sort of indemnity provision in the contract purporting to relieve the towing tugs of all or a part of the tug's liability for its own negligence.

Under these circumstances, since this is not towage which is in any way subject to a regulatory scheme of the Interstate Commerce Commission, it is most important that this vast new arena of maritime operations know as promptly as possible with as much definiteness as possible the extent to which, if any, this Court's public policy rule of *Bisso* is to be relaxed by having exceptions to its applicability created as was done by the Court of Appeals below.

The uncertainty created in the interpretation of these indemnity contracts by the Court of Appeals below, is large indeed, an uncertainty that will undoubtedly lead to much litigation, particularly from the towing operations going on in the offshore drilling operations adjacent to the several states.

In speaking of the clause exempting the tug from liability for its own negligence in the *Southwestern Sugar*

Molasses Company case and the issue presented in that case as to whether or not that clause was valid or invalid under the *Bisso* rule, this Court stated:

> "The issue is one of importance in the development of the law maritime, as to which we have large responsibilities, constitutionally conferred; it is squarely presented on the record before us; and the exigences of this litigation clearly call for its resolution at this stage."[34]

Precisely the same statement applies with even greater force to the issues presented here—is an exception to the *Bisso* rule to be created, and if so, must the indemnity contract provide for such an exception, in plain and unequivocal terms? It is submitted that not only the exigencies of the present litigation, but the exigencies of the development of the law maritime require this Court to consider these important issues. Only with an authoritative decision of this Court can the limit to which the *Bisso* rule is to be relaxed, if at all, be determined, and the sooner this question is settled, the quicker the maritime law in this area will have its course charted in the proper channel, and on smooth seas which will permit the towing industry, both tug and tow alike, to proceed with full speed ahead with each clearly understanding its rights and liabilities.

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[34] **Southwestern Sugar & Molasses Company v. River Terminals Corp.**, 360 U.S. 411, at page 415, 3 L.Ed. 1334, at page 1339, 79 S. Ct. 1210 (1959).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

E. D. VICKERY,
Attorney for Petitioner

Of Counsel:

ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston 2, Texas

August 3, 1962

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Petition for Writ of Certiorari have been served on the attorneys for the Respondent, Mr. Charles Kohlmeyer, Jr., Leml & Kelleher, 1836 National Bank of Commerce Building, New Orleans 12, Louisiana and on Messrs. Brunini, Everett, Grantham & Quin, First National Bank Building, Vicksburg, Mississippi by depositing the same in the United States Post Office with First Class Air Mail postage prepaid to the addresses shown above on this the day of August, 1962.

Of Royston, Rayzor & Cook

APPENDIX "A"

JUDGMENT.

Extract from the Minutes of May 9, 1962

CRESCENT TOWING & SALVAGE COMPANY

No. 19148 versus

DIXILYN DRILLING COMPANY

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for the entry of a judgment consistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellee, Dixilyn Drilling Corporation be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19148

CRESCENT TOWING & SALVAGE COMPANY,
Appellant,

versus

DIXILYN DRILLING CORPORATION,
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

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(May 9, 1962)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

RIVES, Circuit Judge: The appellant (Crescent) and the appellee (Dixilyn) were respondents to a libel filed by the Mississippi State Highway Commission, the City of Natchez, and the Highway Department of the State of Louisiana for $41,363.24 damages sustained by the Natchez-Vidalia Bridge when Dixilyn's Julie Ann, an offshore drilling barge, collided with the underside of the bridge. The Julie Ann was being towed down the Mississippi River by Crescent pursuant to its contract with Dixilyn. Crescent and Dixilyn jointly paid the amount of the libelants' claim

under a stipulation approved by the court, which provided in part that "the libelees, as between themselves, may litigate to a final conclusion all questions of negligence, liability, contribution, indemnity and ultimate responsibility on the part of each or both of the libelees." After a full trial on the merits, the district court entered a final decree holding Crescent solely at fault and liable to repay to Dixilyn its half of the satisfied claim with interest and costs.[1]

The district court found Crescent at fault for not furnishing enough power to hold the Julie Ann while her legs were lowered sufficiently to clear the underside of the bridge, and that Crescent's Tug Orleans had an engine failure which caused or contributed to the lack of sufficient power. It further found that Crescent's Captain Brechtel was guilty of negligence in failing to make an earlier test of the holding power of the tugs with the legs lowered to the required depth, in not causing the Julie Ann to be brought to a complete stop for the lowering of her legs, and in failing to notify Dixilyn's employee Hughes at an earlier time to start the lowering of the legs. Those findings are vigorously attacked by Crescent as clearly erroneous, and Crescent insists that the collision was caused by a misunderstanding of the Dixilyn personnel aboard Julie Ann as to the operation of her legs, and by their failure properly to call the draft of the legs, thereby leading Captain Brechtel to the belief that the legs would clear the underside of the bridge.

A review of the district court's findings of fact would confront us with an extremely difficult decision. Instead, we examine first the towage contract between Dixilyn and

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[1]The opinion of the district court is reported as Mississippi Highway Commission, et al. v. Dixilyn Drilling Corporation, et al. S.D. Miss., 198 F.Supp. 788.

Crescent. If that contract validly shifted liability for the collision damages to Dixilyn or its insurer, whether or not Crescent was negligent, the fact findings as to negligence are immaterial.

The facts necessary for our consideration of the towage contract are not in substantial dispute, and are restated largely from the briefs of the parties.

The Julie Ann, constructed at the LeTourneau plant at Vicksburg, is a self-contained, submersible type drilling rig. She is 193 feet long, 151 feet wide, and has a displacement of 2500 tons. She is triangular in shape, with legs of open truss steel frame construction 175 feet long set on each corner of the triangle. Approximately 30 feet of the legs had not been installed at the time of the collision. The lower end of each leg consists of spud tanks or feet 35 feet in diameter and about 35 feet in height. The legs provide a tripod on which the hull of the barge can be raised or lowered for drilling operations or for navigational purposes. The legs are operated from a control room situated above the quarters. They are lowered and retracted by three 60 cycle motors powered by three generators, any one of which is capable of lowering or retracting all three legs simultaneously. The legs are controlled by three levers, all of which can be manipulated so that each leg can be raised or lowered by itself or with one or both of the other legs.

The barge hull itself is 20 feet in depth (from main deck to bottom), and at the time of the collision the hull afloat was drawing approximately 13 feet. Below the main deck is a machinery deck containing a complex of equipment and tanks necessary for drilling operations, including mud tanks, water tanks, and fuel tanks. On the main deck are located draw works, pipe racks and anchor winches. Two story living quarters are situated above the main deck,

completely equipped as spacious and comfortable accommodations for 45 men, all air-conditioned and equipped with a modern galley, laundry and recreation lounge. The rig is a complete self-contained unit, capable of drilling in more than 100 feet of water, and includes in her equipment slush pumps, a Schlumberger unit, cement unit, mud lab, water evaporator, mud pits and mixers, jets and guns, six diesel engines, and six electric generators.

The Natchez-Vidalia bridge is a fixed highway bridge over the Mississippi River. The lowest member of the bridge is 142.9 feet above mean sea level. The surface of the river at the bridge is 17.28 feet above mean sea level at zero on the Natchez gauge. On December 27, 1957, the date of the collision, the Natchez gauge reading was 33.2 feet, so that there was a clearance of 92.4 feet between the surface of the water and the lowest steel on the bottom side of the bridge. The legs of the rig being 143 feet long, they had to be lowered so that at least 51 feet were below the water in order for the rig safely to clear under the bridge. The legs could not be lowered to a depth that would cause them to foul on the river bottom during the approach to the bridge.

The channel of the river (the deepest portion, in which safe navigation is afforded) approaching the bridge is no less than 1200 feet wide for a substantial distance above it. The contour of the bottom, however, is not level a short distance above the bridge, there being a ledge or bar less than 55 feet below the surface about 2500 feet above the bridge. Accordingly, until the flotilla passed that point, it was impractical for the legs to have been lowered more than 35 feet. All of these facts were generally known, although, of course, the exact level of the water and the exact conditions which would be encountered on the day that

the proposed movement would take place could not be foreseen in advance.

The Julie Ann was scheduled for departure from the builder's yard at Vicksburg for the day after Christmas. Upon hearing that the rig was nearing completion, Crescent solicited the business of towing her to New Orleans, and a letter of solicitation was written. Whether due to this solicitation or otherwise, Dixilyn contacted Crescent in mid-December and suggested a meeting to negotiate a towage contract. A meeting was held at Dixilyn's office in New Orleans in mid-December, attended by Messrs. Tidwell, Boring and Brigham, corporate officers of Dixilyn, Messrs. Wood and Blakely, whose capacity will be hereafter adverted to, and Messrs. Apgar, Smith and Lanman of Crescent. (Mr. Lanman died prior to the trial.) At this meeting, there was a discussion of the general characteristics of the rig and of the timing of the movement, and it was tentatively agreed that Crescent would undertake the towage. Mr. Wood specified that he desired Captain Brechtel to be in charge of the tow, because he had brought one or more rigs down the river on prior occasions. Crescent stated that it proposed to use Captain Brechtel with its small Tug Orleans and two upriver push boats, the Toltec and the Ouachita, if those vessels were available. The navigation of the flotilla was to be under the command of Crescent's pilot, Captain Brechtel.

The Toltec is a triple screw, 3975 horsepower push boat, 130 feet long by 30 feet wide. It was only six months old at the time of the collision and was the sixth most powerful towboat then running on the Mississippi River. The Ouachita is a twin screw, 1800 horsepower push boat, 90 feet long by 26 feet wide. The Orleans is a single screw tug of 700 horsepower, 100 feet long by 26 feet wide.

The exact role of Mr. Wood does not appear by the evidence. Mr. Wood died before the case was tried, and Mr. Blakely was not called to testify. Wood, however, was the president and owner of a marine surveying company in New Orleans and had had substantial experience in the engineering and moving of submersible drilling rigs comparable to Julie Ann. Blakely was one of his staff. Evidently they represented Dixilyn in this instance, or Dixilyn's underwriters, for they were at the meeting and participated in the conference and did not represent or have any connection with Crescent.

The district court found that the question of a provision in the towage agreement releasing Crescent of all liability was not determined at that meeting, and that nothing definite was agreed on other than that Crescent would undertake the towage and would place it in charge of Captain Brechtel.

Following the discussion at the meeting, Crescent's vice president, Mr. Apgar, after consulting with its admiralty counsel, Mr. Kohlmeyer, wrote a letter to Dixilyn as follows:

"December 19, 1957

"Dixilyn Drilling Corp.
Saratoga Building
New Orleans, Louisiana.

"Attention: Mr. H. Brighan
Executive Vice President

"Subj: 'JULIE ANN' From Vicksburg
December 26th, 1957

"Gentlemen:

"We wish to confirm our recent conversation including Mr. M. O. Boring, Jr. and Mr. Mike

Smith, in which we discussed the towing of the 'JULIE ANN' from Vicksburg to our Fleet Landing in the New Orleans harbor.

"We understand that the 'JULIE ANN' will be ready to leave Vicksburg the morning of December 26th and we expect to be in Vicksburg ready to move her at that time; we contemplate using two river pushboats (towboats) of substantial horsepower and one tugboat. For the trip from New Orleans to her offshore location, seagoing tugboats will be used.

"This tow will be performed by Crescent subject to towage release clause, copy of which is attached and is part of our agreement with you; it being mutually understood and agreed that in consideration of including this clause lower rates prevail. It is also necessary that we (Crescent Towing & Salvage Co., Inc.) be included in the 'JULIE ANN' hull and P & I Insurance coverage and we will appreciate receiving a letter or telegram from your underwriters or brokers to this effect as soon as possible.

"We will continue to keep in touch with your office and know that you will advise us if there is any change in the anticipated readiness of the rig at Vicksburg .We appreciate very much your calling upon us to tow the 'JULIE ANN.'

"Very truly yours,

"CRESCENT TOWING & SALVAGE CO., INC.

"By /s/ Warren C. Apgar
"VICE PRESIDENT.

WCA:m
Encl. (1)

cc - Mr. Pic
Rate files

"TOWER'S RELEASE CLAUSE

"All towage will be performed solely at the risk of the craft towed and its cargo, including the risk of negligence of the master, pilot and crew of the towing craft and our employees, agents and representatives, all of whom in respect to the towage shall become and be the servants of the craft towed and its owners and operators; provided that nothing herein contained shall be construed as making the craft towed, its owners or operators, liable or responsible for loss of or damage to the towing craft or property owned by third parties or for loss of life or personal injury for which the craft towed, its owners or operators, would not otherwise be liable or responsible. Neither we nor the towing craft nor its owners or operators shall be liable, and the craft towed and its owners and operators shall hold us and the towing craft and its owners and operators harmless from any liability, for any loss of or damage to the craft towed and its cargo from any cause whatsoever, including loss or damage caused by negligence of the master, pilot and crew of the towing craft and our employees, agents and representative. We reserve the right to tow all vessels singly or with other craft and to change craft towed from one to another tow as frequently as we may find it convenient to do so. Release of craft to be towed to any vessel owned or used by us for towage shall be conclusive evidence of the acceptance of these conditions."

The letter was referred by Dixilyn to representatives of the underwriters of the barge, and they were dissatisfied with the "Tower's Release Clause." Mr. Tidwell of Dixilyn called Mr. Apgar of Crescent and told him simply that the

clause was not acceptable. Crescent submitted to Dixilyn a second letter, one sentence of which, as indicated, was found objectionable:

"December 23, 1957

"Dixilyn Drilling Corporation
Saratoga Building
New Orleans, Louisiana.

"Gentlemen:

"With further reference to our undertaking to tow your drilling barge JULIE ANN from Vicksburg to our Fleet Landing in New Orleans and then down the Mississippi River into the Gulf, we confirm that the following additional clause shall be included in the contract as part of the consideration for our undertaking the towage:

~~"You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipment and our and their underwriters of and from any and all liability or claim which may arise out of the towage of the drilling barge.~~ It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters.

"It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims.

"If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files.

"Very truly yours,

"CRESCENT TOWING & SALVAGE CO., INC.,
"BY /s/ Warren C. Apgar
"VICE PRESIDENT.

WCA:m

"APPROVED:
"Dixilyn Drilling Corporation
By: _____ (NOT SIGNED.)"

The circumstances under which the letter was redrafted with the objectionable clause omitted are thus stated in the testimony of Mr. Tidwell of Dixilyn:

"Well, when I received the letter, I didn't understand it, so I had been advised and been discussing the matter with Mr. Griffin and Mr. Stenz, who are with Southern Marine and Aviation Underwriters, so I called them when I received this letter and read it to them on the phone and asked them if it was all right for me to sign it or normal precedure for me to sign it. So they had me to read it again and studied it and talked about it. So there was one sentence in there they said they wouldn't like to sign at all with that sentence in it.

"They said they wouldn't like for me to sign that letter at all with that one sentence in it and said,

in fact, all the letter was objectionable, that they wouldn't like for me to sign it at all, but I could go ahead and sign it with that one sentence if it was stricken out, and said even though the rest of the letter—'We don't like it; it's been proven that it's not legal by a prior case in court; that it's not a legal document, but if they insist on you signing it, it will be all right to go ahead but we don't like it, but you can sign the rest of it.' So I called Mr. Apgar and told him I couldn't sign it at all with that one sentence in it; that I would sign it if they would strike that sentence out. So he said, 'Well, we'll re-write the letter verbatim, just leaving out that sentence.' And he wanted to know if I would sign it if they would do that. He did; sent me another letter, and I called Mr. Griffin and Stenz and read that letter to them and told them it was exactly the same except that one sentence was left out, and they advised me to go ahead and sign it. That is why I signed it on their advice, because I felt like I needed some help because I didn't understand it. But I did sign it, not understanding, on their advice."

As indicated, the letter was redrafted with the objectionable sentence omitted and, as thus redrafted, was signed by Mr. Apgar for Crescent and by Mr. Tidwell for Dixilyn.[2]

As to whether the towage contract should be construed to shift to Dixilyn liability for collision damages in any event, including damages due to negligence of Crescent, the district court held:

"The second question presented by this record for determination is whether or not the Dixilyn

[2]The consideration and other details were agreed upon verbally.

agreed to indemnify Crescent for any and all damages that might be suffered by third parties and, as heretofore stated, Crescent relies upon the second letter of December 23. The evidence and correspondence is clear to the effect that Dixilyn declined so to do and declined to execute the towage release clause requested by Crescent. Crescent, of course, knew before the refusal of Dixilyn to execute those documents that Dixilyn did not intend to release Crescent from any liability to third parties due to the negligence of Crescent. In order for one to release the other party for damages due to its own negligence, the contract of indemnity must be clear and definite in its terms that such is the intention . . .

"Since the damages to the bridge flowed from the negligence of Crescent, it is clear under the above authorities that Dixilyn did not indemnify or agree to indemnify Crescent by its letter of December 23."

We have re-stated all of the evidence in the record which would support the district court's finding as to the intent of Dixilyn and as to Crescent's knowledge or notice of that intent. Mr. Tidwell signed the letter contract on behalf of Dixilyn in reliance upon advice from Griffin and Stentz, the underwriter's representatives. That advice was not communicated to Crescent, nor was Crescent advised of the reasoning or intention upon which that advice was based. Actually the advice which Griffin and Stentz gave Tidwell recognized that the meaning and intent of the contract were unfavorable to Dixilyn, but expressed the view that the contract was illegal. "We don't like it; it's been proven that it's not legal by a prior case in court; that it's not a legal document, but if they insist on you

signing it, it will be all right to go ahead but we don't like it, but you can sign the rest of it."

Dixilyn's rejection of the Tower's Release Clause attached to Crescent's letter of December 19 and its rejection of the sentence stricken from Crescent's first letter of December 23 are not necessarily inconsistent with an intent on the part of Dixilyn to release Crescent from any liability to third parties due to the negligence of Crescent. To the contrary, Dixilyn's refusal to accept the Tower's Release Clause and its insistence on eliminating the sentence from the letter may have been because Dixilyn was not willing to accept liability (1) for fault and negligence on the part of Toltec and Ouachita and their owners, and (2) for collision damages occasioned by Crescent's tug Orleans on its voyage up river to pick up the Julie Ann. If the second letter of December 23 which Dixilyn approved as a part of the agrement of towage expressed plainly and unequivocally that Dixilyn accepted liability for any damage claims of third parties, including those caused by Crescent's negligence, or that Crescent was to have the benefit of Dixilyn's insurance, then the intention so expressed is not inconsistent with Dixilyn's earlier rejections of the Tower's Release Clause and of the sentence stricken from Crescent's first letter of December 23. On the other hand, if that letter is doubtful or ambiguous, then we should place ourselves as nearly as possible in the situation of the parties and should consider the language of the agreement in the light of the previous meeting and correspondence and of all of the attendant and surrounding circumstances. Compare Restatement of Contracts, Section 230-235.

> "The cardinal rule of interpretation of indemnity contracts is the same as in the case of other types

of contracts, namely, the ascertainment of the intention of the parties." Annotation 175 A.L.R. 29.

This Court has held in many cases that the failure of an indemnity contract to refer expressly to negligence evidences an intention not to indemnify against losses resulting from the indemnitee's negligence.[3]

In two cases where the contract did expressly refer to negligence, it was held to provide indemnity for losses resulting from the indemnitee's negligence.[4]

The more recent case of *Batson Cook Co. v. Industrial Steel Erectors*, cited in note 2, *supra*, while holding against the indemnitee, did so both because of failure to use the "talismanic words," and also because of inability "to find the equivalent clear intent in other language of the agreement." 257 F. 2d at 412. Finally, our most recent opinion on the subject expressed the view that the rule requiring that in order to relieve the indemnitee from liability for losses caused by his own negligence, the contract must contain an express stipulation to that effect "rests on an unsound and dangerous foundation" for reasons well stated by Chief Judge Tuttle:

> "It presumes, first of all, that one party's assumption of liability for losses due to another's negligence is an 'unusual' and 'hazardous' under-

[3] Southern Bell Telephone & Tel. Co. v. Mayor & Aldermen of Meridian, 5 Cir., 1935, 74 F.2d 983,986; Halliburton Oil Well Co. v. Paulk, 5 Cir., 1950, 180 F.2d 79, 81; Martin v. American Optical Co., 5 Cir., 1950, 184 F.2d 528, 529; W. C. Shepherd Co. v. Royal Indemnity Co., 5 Cir., 1951, 192 F.2d 710, 717; Standard Oil Co. v. Wampler, 5 Cir., 1955, 218 F.2d 768, 770; Batson Cook Co. v. Industrial Steel Erectors, 5 Cir., 1958, 257 F.2d 410, 412, et seq.

[4] Thomas v. Atlantic Coast Line R. Co., 5 Cir., 1953, 201 F.2d 167, 169; A.G.S. R. Co. v. L&N R. Co., 5 Cir., 1955, 224 F.2d 1, 4.

taking. We cannot agree. In the light of modern conditions, we perceive little justification for so characterizing the indemnitor's obligation. Insurance companies assume this obligation every day, especially in connection with automobile liability policies. And, it is common knowledge that the device of insuring against one's own negligence through indemnity contracts is frequently employed in other business ventures.

"Perhaps more important, even assuming that the burden imposed on the indemnitor is 'unusual' or 'hazardous', the majority rule presumes that courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with the plain and clear meaning of the language employed by the contracting parties. This is a dangerous and unwarranted extension of the judicial function. If a court feels that contract imposes an extraordinary liability on one of the parties, it may, in certain instances, pronounce the contract void as being contrary to public policy. But where, as here, a contract does not violate public policy, we have no authority to achieve the same result by concluding that the parties did not really mean what the unambiguous language of their agreement imports."

Jacksonville Terminal Co. v. Railway Express Agency, Inc., 5 Cir., 1962, 296 F. 2d 256, 262, 263.[5]

Thus the strict rule so frequently expressed in the cases appears to be giving way somewhat to the modern practice

[5]We recognize that a part of this criticism does not apply to a case of admiralty or maritime jurisdiction in view of the more extensive power of the Supreme Court in such cases. See Gilmore & Black, The Law of Admiralty, Sec. 1-16, pp. 40-42.

of providing liability insurance, and of bargaining as to which party shall bear the expense of such insurance. According to Mr. Apgar's testimony that expense was large; recently, in towing another drilling rig, Crescent had been charged one per cent of the value of the craft to be towed as a premium to protect for the one trip against liability for any damages. If Crescent had assumed that expense, it would have been reflected in its charge for towage. Actually, the rate charged on the Tug Orleans was $35.00 an hour, which Mr. Apgar testified was the customary charge for a normal operation with the Orleans.[6]

The letter contract plainly stated that the "additional clause" was "part of the consideration for our undertaking the towage."[7] The contract then provided:

> "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for yor account and account of your underwriters."

Some liability might have rested on Crescent for unseaworthiness not caused by negligence, but the most substantial liability to which Crescent might be subjected was that based on its own real or claimed negligence. If "any

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[6]Crescent was authorized to contract for the services of the other tugs, the Ouachita and Toltec, at the best rates available, and was not questioned on that part of the transaction.

[7]In its letter of December 19, to which the proposed "Tower's Release Clause" was attached, Crescent had stated "it being mutually understood and agreed that in consideration of including this clause lower rates prevail."

claims urged by third parties," as used in the exculpatory sentence, is interpreted not to include claims based on Crescent's negligence, then the provision is deprived of any real meaning.[8]

If Dixilyn had any doubt of Crescent's intention that doubt should be removed by the next paragraph of the letter:

> "It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims."

Why should Crescent be interested in Dixilyn's insurance unless that was meant also to protect Crescent? As to third-party claims, Dixilyn's insurance was to amount to four million dollar. When that agreement is coupled with the agreement in the preceding paragraph "that any damage claims urged by third parties . . . in the course of the towage shall be for your account and account of your underwriters," the conclusion is inescapable that Dixilyn agreed to afford Crescent the benefit of Dixilyn's insurance. There seems little doubt that Griffin and Stentz, representatives of Dixilyn's underwriters, clearly understood Crescent's intent, but chose to rely on their opinion that ". . . it's been proven that it's not legal by a prior case in court . . .

The district court having held that the contract was not sufficiently specific to require Dixilyn to indemnify Cres-

[8] The "Tower's Release Clause" attached to Crescent's letter of December 19 had put Dixilyn on notice that Crescent was seeking indemnity against losses resulting from its own negligence.

cent against third-party claims based on Crescent's negligence, or to bind Dixilyn to afford Crescent the benefit of Dixilyn's liability insurance, did not reach the question of whether such a contract is valid. The "prior case in court" which led Griffin and Stentz to think the contract invalid was, in all probability, *Bisso v. Inland Waterways Corporation*, 1955, 349 U. S. 85, or its companion case, *Boston Metals Co. v. The Winding Gulf*, 1955, 349 U. S. 122. In those cases the Supreme Court created, or accepted as based upon public policy, a judicial rule in admiralty invalidating contracts releasing towers from all liability for their negligence.[9]

In *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 1959, 360 U.S. 411, the Court held that where the exculpatory clause had been filed as part of a tariff with the Interstate Commerce Commission it should not be struck down as a matter of law until the parties had been afforded a reasonable opportunity to obtain the views of the Commission, and stated:

> "The rule of *Bisso*, however applicable where the towboat owner has 'the power to drive hard bargains,' may well call for modification when that power is effectively controlled by a persuasive regulatory scheme.
>
> "Further, it may be noted that the clause relied on in this case is by its terms restricted to the situation where shipments are transported to barges furnished by others than the towboat owner.

[9]Mr. Justice Black delivered the opinion of the Court in **Bisso** with the concurrence of the Chief Justice and of Justices Clark and Minton. Justice Douglas wrote a separate concurring opinion and Justice Frankfurter wrote a full dissenting opinion in which he was joined by Justices Reed and Burton. Justice Harlan did not participate.

> Whatever may be the considerations involved in forbidding a towboat to contract for exemption from liability for negligence in other circumstances, it may be that different considerations apply when the towboat moves barges which are delivered to it loaded, so that it never has an opportunity adequately to inspect them below the waterline, and which, if defective, may create emergency situations where a small degree of negligence can readily lead to very substantial monetary loss. *If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards uncertain, it may be that in an area where Congress has not, expressly or by fair implication, declared for a particular result, the federal courts should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances.*" (Emphasis supplied.)

360 U. S. 418, 419, 420.

Virtually the same distinction suggested in the part of the last quotation which we have emphasized was adopted by the Second Circuit in an opinion by Judge Frank the year before the decision in *Bisso*. *North River Barge Line v. Chile* S.S. *Co.*, 2 Cir., 1954, 213 F. 2d 882. The Southern District of New York has since held that the stricture of *Bisso* is not applicable to invalidate an exculpatory clause where the tower had undertaken to tow a scow in an ice-clogged river. The district court said:

> "Here, the tower, perceiving that there was unusual danger in towing in ice, made it a condition of his assuming a contract of towage that he be spared the difficulty and expense of defending

himself in lawsuits resulting from accidents which were likely to result in the extrahazardous situation into which the tow owner had voluntarily put his property. Accordingly, the structure of the Bisso case is not applicable to the limited relief from liability at issue."

Chile Steamship Co. v. The Justine McAllister, S.D. N.Y., 1958, 168 F. Supp. 700, 702.

The rationale of the rule in *Bisso* was thus expressed in the opinion of the Court:

> "The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains."

Bisso v. Inland Waterways Corp., *supra*, 349 U. S. at 91.

Reason (1) is inapplicable to the facts of the present case upon much the same ground as that expressed in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, *supra*. Reason (2) is clearly inapplicable to the facts of this case. Crescent's acquiescence in Dixilyn's rejections of two exculpatory provisions indicates that there was no economic presure exercised by Crescent in the negotiation of the contract. The evidence showed that Crescent had competition on movements of this kind from three harbor towing companies in New Orleans and from other in Mobile and in the Galveston-Houston area. Crescent was in no position to overreach Dixilyn or to drive a hard bargain. We conclude that, under all of the circumstances of

this case, the *Bisso* rule is not applicable to prevent Dixilyn from indemnifying Crescent against third-party claims based on Crescent's negligence or to prevent Dixilyn from binding itself to afford Crescent the benefit of Dixilyn's liability insurance.

It was stipulated that Crescent carried hull insurance and protection and indemnity insurance on the tug Orleans in an amount more than sufficient to cover the amount of the claims of the libelants in this case. Dixilyn insists that, if it must indemnify Crescent, the measure of damages is the cost of Crescent's insurance and relies on *Standard Oil Co. of Texas v. Wampler*, 5 Cir., 1955, 218 F. 2d 768, 771. In that case, Standard, after being furnished a certificate showing that the policy of insurance secured by Wampler did not protect Standard, made no objection. Judge Allred writing for this Court said:

> "Under these circumstances, it seems to us the proper measure of damages would be the premiums paid for this insurance.[4]
>
> "[4] Cf. Capital Life Ins. Co. v. Driscoll, Tex. Civ. App., 199 S.W. 872, 875."

The Court of Civil Appeals of Texas, in the case cited, had said:

> "Where an applicant contracts for a certain character of insurance policy and such policy is refused, and he can then only obtain a like policy at an increased annual premium, the proper measure of damages, we think, is the difference between the premiums of the policy contracted for and the policy he can get." (199 S.W. at 875.)

In the instant case Crescent had received no notice prior to the collision that Dixilyn had failed to obtain insurance to indemnify it and Crescent against third-party claims whether based on Crescent's negligence or not.[10] This case is therefore distinguishable from *Standard Oil Co. of Texas v. Wampler*, *supra*, and Dixilyn is liable to Crescent for the amount, with interest and costs, paid by Crescent to the libelants. The judgment is reversed and the cause remanded for the entry of a judgment consistent with this opinion.

REVERSED WITH DIRECTIONS.

A true Copy
Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

By CLARA R. JAMAC
Deputy
New Orleans, Louisiana

July 23, 1962

[10]We, of course, intimate no opinion as to whether either Crescent or Dixilyn has a claim against Dixilyn's underwriters since they are not parties to this litigation.

APPENDIX "B"

IN THE

DISTRICT COURT OF THE UNITED STATES

For the Southern District of Mississippi
Western Division

No. 871 in Admiralty

MISSISSIPPI STATE HIGHWAY COMMISSION, CITY OF NATCHEZ, DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA,
Libelants

versus

DIXILYN DRILLING CORPORATIONS AND CRESCENT TOWING & SALVAGE COMPANY,
Respondents

OPINION OF THE COURT

The Libelants, on December 22, 1958, filed their libel in the District Court, seeking to recover damages in the amount of $41,363.24, which they had sustained when their bridge across the Mississippi River, located between Natchez and Vidalia had been struck by the off-shore drilling barge, Julie Ann. The accident occurred December 27, 1957. Libelants averred that the Defendants, Dixilyn Drilling Corporation and Crescent Towing & Salvage Company, Inc., were guilty of negligence that proximately caused the damages to the bridge. In March, 1959 Dixilyn Drilling Corporation, hereinafter referred to as Dixilyn, filed its answer denying negligence on its part, but admitted it had employees on board the rig who were in charge of raising and lowering the legs that will hereinafter be more particularly described, but denied the failure to lower the

legs was any negligence on the part of Dixilyn. It averred that the fault was all on Crescent and that Crescent did not have sufficient power to stop movement of the offshore drilling rig when it became apparent that the same could not pass under the bridge without one of its vertical legs colliding with the bridge, and further averred that Crescent failed to give the signal it should have given in time to lower the legs. In March, 1959 Crescent filed its answer and denied any negligence on its part and averred that the collision was due to the negligence of Dixilyn; averred that the rig was fully manned and controlled by a crew of specialists during the trip down the river; averred that Crescent did not have dominion or control over the maneuvering of the barge or the legs thereof and that the fault was entirely due to the crew of the Dixilyn. At the same time Crescent filed a petition under Rule 56 of Admiralty. This petition was based on the contract between the parties for the performance of the service of towage. It attached thereto as exhibits two letters, one dated December 19 and one dated December 23, 1957, which it alleged constituted the agreement. The petition further alleged that under the terms of the contract Dixilyn had agreed (1) to indemnify Crescent for all damages which might arise out of the movement, including claims of third parties; and (2) to procure full insurance protection at its own expense against all risks, including damage to any bridge or structure, and such insurance to insure to the benefit of Crescent as well. Dixilyn answered the petition and denied that it had agreed to the indemnity provisions of the contract or to the provisions relative to the insurance, and denied that the Dixilyn crew had anything to do with the movement of the legs other than to raise or lower them as directed by the employees of Crescent;

denied that its crew was in charge of the timing and mechanics of raising and lowering the legs or that there was any error on its part in reading or reporting the draft marks of the legs; and denied the interpretation that was placed on the contract by Crescent. On April 21, 1959 Libelants answered the petition under Rule 56 of Admiralty and averred that one or both of the Defendants were liable. After several pretrials the Defendants stipulated that the Libelants were entitled to a judgment for the damages to the bridge against either one or both of the Defendants. In March of 1960 the case came on for trial on its merits with reference to the contest between the Defendants as to which one was liable.

The controversy grew out of a contract between Crescent and Dixilyn under the terms of which Crescent contracted to tow down the Mississippi River from Vicksburg to New Orleans, Louisiana a large off-shore drilling barge or rig named the JUDIE ANN. It left Vicksburg, Mississippi on December 26, 1957 and as it undertook to pass under the bridge which crosses the Mississippi River at Natchez one of the legs on the rig had not been sufficiently lowered to pass under the bridge and it stuck the bridge, doing damage to the amount of $41,363.24. This rig was gigantic in structure. She was 194 feet long, 152 feet wide and 20 feet deep, triangular in shape, with one movable leg at the bow and two at the stern. The legs were 175 feet long, with open truss steel frame construction. The lower ends contained pontoons or spud tanks 35 feet in diameter and 35 feet in overall height. The legs provided a tripod on which the platform could be raised or lowered at the rate of approximately one foot per minute. The draft of the hull was 13 feet. Beyond the main deck was a machinery deck containing a complex lot of equipment

and tanks necessary for power service and oil well drilling operations. On the main deck were located draw works, pipe racks, two revolving deck cranes, three anchor wenches and 2-story living quarters, atop which was a control tower. The rig was a complete unit. The living quarters were spacious, affording accommodations for 45 men, with year-round temperature control.

The Defendant Crescent is a towing company, engaged in harbor, off-shore and ocean towing and tug work, and sometime in November of 1957 Crescent sought the business of towing the rig down the Mississippi River ultimately to its off-shore location. This solicitation was in the form of a letter dated December 18, 1957 from E. J. Pic, Jr., operating manager of Crescent, to Mr. Pickering of Dixilyn. Sometime between December 16 and 18, 1957 a meeting was held in the New Orleans office of Dixilyn, at which meeting there were present M. O. Boring, Jr., President of Dixilyn; Russell Tidwell, a petroleum engineer for Dixilyn; Charles D. Wood of Charles D. Wood Company, a marine surveyor representing Southern Marine and Aviation Underwriters Insurance, one of the excess coverage carriers for Dixilyn; H. W. Blakely of Charles D. Wood Company, a marine surveyor of Southern Marine and Aviation Underwriters, Inc.; Warren C. Apgar, Vice President of Crescent; and William S. Smith, Jr., also a Vice President of Crescent. The problem of transporting the JULIE ANN from Vicksburg to New Orleans was discussed, and particularly the size of the rig, the length of the legs, the current, and the size and number of the tow boats that were to be used in the towage of the rig downstream. After various discussions it was found that John J. Brechtel, a Crescent employee and experienced river man and tugboat operator, engaged by Crescent and regularly employed

by them, could be furnished, and Crescent agreed to place Captain John J. Brechtel in charge on its behalf before understaking to tow the rig to its point of destination; that he would be in command of the tug and all tows, and it was further agreed that Dixilyn would have an experienced man on the rig who would be in charge of lowering the legs of the rig when he was notified by Captain Brechtel that the legs should be lowered. At this meeting it was discussed as to the length of the legs that should be left off in order to reduce the force of the current on the rig and in the discussion the length of 60 feet was considered, but finally Mr. Brigham, who represented Dixilyn, advised that 30 feet already had been left off the legs and ultimately Crescent agreed that 30 feet left off would be sufficient. Apgar, representing Crescent, suggested that Crescent would require a clause in the towing agreement releasing Crescent from any and all liability in connection with the movement. Nothing definite was agreed on at this discussion, other than that Crescent would undertake the towage and would place in charge of it Captain Brechtel. The question of a clause in the towage agreement releasing Crescent of all liability was not determined at this meeting, but finally was agreed upon by correspondence after some negotiation and elimination of oral demands that were made by Crescent and the agreement ultimately was reduced to writing, as is shown by letters hereinafter to be referred to.

After that meeting another one was held on December 18 and 20, 1957 in the offices of Dixilyn, where representatives of each party were present, as well as representatives of Southern Marine & Aviation Underwriters. However, these representatives of the Underwriters were there simply as consultants and had no authority to bind anyone, and

at this meeting the nature of the release clause was discussed, but no definite agreement reached. Griffin and Stentz requested Apgar to submit the type of release clause desired by Crescent and on December 19 Apgar wrote Dixilyn, to which was attached the standard towage release clause used by Crescent. Dixilyn declined to execute that and requested Apgar to submit another type. Brigham, who represented Dixilyn, was not present when it arrived, so Tidwell, an authorized representative of Dixilyn, received it and upon its receipt called Griffin and Stentz of Southern Marine for their comments, and after talking to them declined to accept it, but asked that Apgar submit another clause for their approval. On December 23, 1957 Apgar wrote a letter setting out what they desired and this was received by Tidwell, who did not understand the full meaning of the letter and so again he called Griffin and Stentz and was advised by Griffin and Stentz that the letter was objectionable because the first sentence of the second paragraph was illegal and unenforceable. Tidwell then relayed this information to Apgar, who then called Griffin and Stentz to determine what he could further agree to. Griffin and Stentz told him they could not agree to that, but for them to submit another letter excluding the objectionable sentence and they would instruct Tidwell to sign it. Apgar then sent a third letter, dated also December 23, and upon its receipt by Tidwell he called Griffin and Stentz for advice. Griffin told him to sign the letter in that form, but that it was illegal and unenforceable, so his signing it would make no difference, and thereupon the second letter of December 23 was signed by Tidwell and copy returned to Crescent. Tidwell then went to Vicksburg to join the JULIE ANN. The important

part of the second letter of December 23, 1957 reads as follows:

> "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liabilities for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters."

The first letter of December 23, 1957 contained this language:

> "You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipmnet and our and their underwriters of and from any and all liability or claims which may arise out of the towage of the drilling barge."

This sentence was eliminated and does not constitute a part of the written agreement.

Crescent contends, among other things, that Dixilyn is estopped to deny liability under that agreement because Dixilyn knew that that part of the agreement was void and unenforceable. This contention of estoppel cannot be accepted because Dixilyn did nothing to mislead Crescent. The parties were dealing with each other at arms length and had received advice from their attorneys. The doctrine of estoppel therefore does not apply.

On December 24 Crescent's tug ORLEANS left the city of New Orleans for Vicksburg with Captain Shirer as pilot and Walter Puckett as relief pilot, Robert Ricord

as engineer, a Mr. Gonzales as relief engineer, and an oiler. Fog delayed their arrival in Vicksburg for the appointed time for the departure of the rig. About midnight of Christmas Day the 4,000 h.p. triple screw TOLTEC arrived at the LeTourneau plant in Vicksburg. She was in command of Captain Dellie Clark with Captain E. M. Mathes as pilot on the forward watch. About the same time the 1800 h.p. twin screw OUACHITA, a riverboat from Vicksburg, reported at the LeTourneau plant. She was commanded by Captain W. W. Powell as master and Captain Louis O'Donnell as pilot. The JULIE ANN was located in the river at the LeTourneau yard. Her hull was raised out of the water about 9 feet on her legs. On board were Tidwell, Charles Wood and Wayne B. Hughes, who had been resident engineer for Dixilyn during the construction of the rig and whose duty it was to lower and raise the legs when directed to do so by Captain Brechtel. On board also was Lloyd Cotton, a marine engineer in charge of customer relations between LeTourneau and Dixilyn and who was on board as advisor to Dixilyn only. Also on board were a number of Dixilyn employees and a number of electricians and welders employed by LeTourneau. These LeTourneau employees were doing additional work as the boat was to be towed down the river, but had no connection with the towing or maneuvering of the flotilla whatsoever. Captain Brechtel was the master and in complete charge of the flotilla and had authority over all of Crescent employees.

About 8:00 A.M. on December 26 the two tugboats made up to the JULIE ANN, the TOLTEC to a steel bar across the drilling slot in the stern of the rig and the OUACHITA to the TOLTEC'S port side. Captain Brechtel missed connections and failed to arrive at 8 o'clock

on December 26. However, Captain Clark, who is a competent tugboat operator, inquired of Hughes if Dixilyn was ready, received a reply that Dixilyn was ready, and thereupon these tugs started out from Vicksburg with the rig. Captain Brechtel was an experienced operator of tugboats on the river and had towed two other LeTourneau drilling rigs down the river prior to this time. The flotilla had no trouble during the voyage down the river until it anchored for the night a considerable distance above Natchez. Captain Brechtel knew the river, the currents and the dangerous spots, and it was his judgment upon which all of Crescent relied. He joined the flotilla before they left the next morning from the point where they had anchored for the night. Captain Louis O'Donnell of Crescent rode on top of the JULIE ANN control tower and gave signal instructions to Captain Clark by a telephone communications system rigged between the JULIE ANN and the pilot house on the TOLTEC. About 2:00 P. M. the flotilla was joined by the tug Orleans, which made up to the starboard side of the TOLTEC.

Down the river about 5-3/4 miles, upstream from Natchez, an electric power line crosses the river. The lowest part of the line was approximately 108 feet above the surface of the river and the depth of the river at that point was 41 feet. At this point the tow was turned around and headed upstream to test the ability of the towing vessels to stop the rig. The legs were lowered approximately 35 feet and the power supplied by the TOLTEC, the OUACHITA and the ORLEANS was sufficient to hold the tow. The power of the TOLTEC was then reduced to allow the JULIE ANN to drift under the power line with the draft of 35 to 45 feet on her legs. After this maneuver the flotilla was moored for the night at a point

known as Rifle Point and it was at this place that Captain Brechtel joined the flotilla. No difficulty was encountered from Vicksburg to this point, but care was exercised in coming under the power lines. Captain Brechtel had come by taxi to Natchez and at Natchez he joined Captain Harry Wilson, who was in charge of the United States Engineers' boat, the ORLEANS, and that boat proceeded to Rifle Point with Brechtel and there Captain Brechtel boarded the flotilla. Captain Wilson had informed Captain Brechtel of the various depths of the channel from a point immediately in front of the Natchez bridge upstream for a distance of two miles or more. Upon arriving at the flotilla, Brechtel went aboard his tug, the ORLEANS, to assist in mooring and then went on the JULIE ANN. After a discussion of the conditions of the river, depth of the water, the dangers of the currents and the location of the rock ledge, known only to Captain Brechtel, he (Brechtel) determined that 55 feet draft on the legs would be sufficient to clear the rig through the Natchez Bridge. The lowest part of the rig was 142.9 feet above mean sea level and Captain Brechtel determined that there was a channel well inn excess of 60 feet in depth, approximately 1000 feet wide, extending from Natchez bridge upstream a distance of more than two miles.

About 7:00 A. M. the flotilla was somewhere in the neighborhood of Learned's Mill, about 1-1/4 miles above the Natchez bridge. The rig was turned around and headed upstream and the legs were lowered to a draft of 35 feet. At this point a test was made of the holding power of the tugs against the tows and in the opinion of Captain Brechtel, with the legs lowered 35 feet the tugs would hold. No test was made at this point, or at any other point, to determine the holding power of the tugs with

the legs lowered to a depth of 55 feet, which was required in order to pass under the bridge. Without making a test to a depth of 55 feet, Captain Brechtel, in charge, permitted the flotilla to drift downstream toward the bridge before giving orders or notice to depress the legs. Captain Brechtel, with his knowledge of the river, knew that there was a submarine cable crossing the river about 2,500 feet above the bridge and about 1,500 or 2,000 feet above it there was a rock ledge that made out from the Mississippi shore. He knew that under the bridge there was a right hand set or right hand draft in the current away from the Mississippi bank toward a bridge pier on the West side of the navigation span. He knew this condition of the current had a tendency to force boats into that pier. Without making any further tests, he maneuvered the flotilla toward the Mississippi bank across the rock ledge, and at no time did he bring the flotilla to a stop after having crossed the ledge or give any signal to Hughes when to begin to lower the legs. He failed to stop the flotilla after he crossed the dangerous and hazardous rock ledge for Hughes to lower the legs 55 feet and neglected to give Hughes notice when to begin lowering the legs, as he had agreed to do and upon which assurance Hughes relied, and it was Hughes who discovered for himself that a leg was going to strike the bridge. As the legs were lowered the power of the current was too great for the tugs even to stop the barge, or even slow it down, until Hughes could lower the legs to the necessary depth. The engine on one of the boats was defective and not sufficient to put forth its full power, but even if it had put forth its full power, still the power of all the tugs would have been insufficient to hold the boat with the legs lowered to a depth of 55 feet. When it was made apparent to

Brechtel that the flotilla would not clear, he ordered all boats full speed ahead, but was unable to stop the flotilla or slow down in time for the legs to be sufficiently lowered. Brechtel contended that Hughes miscalled the reading of the depth of the legs, but I am unable to find from all the testimony in this case that he relied upon such reading or that he had any reason or justification to rely upon same, as the function of Hughes on the JULIE ANN, and only function in so far as the towage was concerned, was to lower or raise the legs when directed so to do by Brechtel. Hughes knew nothing about maneuvering the flotilla and knew nothing about the currents or the danger spots in the river, but insofar as maneuvering a tow down the river, the flotilla was entirely in charge of Captain Brechtel. The tow itself had no power, but was controlled entirely by the movements of the tugs and the power afforded by the tugs, all of which were under the command of Captain Brechtel. As the flotilla was proceeding under the bridge and Mr. Hughes discovered that it would probably not pass under the bridge unless the tow was slowed down, he began immediately, as soon as he discovered the perilous situation, to lower the legs as rapidly as could be done. He was guilty of no negligence or carelessness in failing to begin lowering the legs earlier for the reason that he did not know where the rock ledge was and was depending on Captain Brechtel to advise him when to lower the legs. He continued to lower the legs as rapidly as the power afforded under the mechanism would permit him to do. The mechanism and the construction of the legs provide no way by which the lowering can be speeded.

The JULIE ANN, with all of the drilling equipment and paraphanalia on board, probably weighed several hundreds of tons and it was known to Crescent that towing

her down the river would be a very hazardous undertaking. She was a special craft, requiring special skill, management and control. On the voyage down the river Crescent knew that there were some three or four bridges under which she would have to pass. Crescent knew the location of utility lines and pipes which traversed the river and it could be foreseen, or should have been foreseen that unusual care and caution in the undertaking should be exercised. Not to have seen and anticipated this condition of itself would be negligence on the part of Crescent. The task required an unusual and extraordinary amount of power to safely maneuver it. The obligation rested upon Crescent to navigate the flotilla with reasonable care, depending upon that degree of care commensurate with the hazardousness of the undertaking. The JULIE ANN had no power of its own and no one on board who was expected or, under the contract, required to do any of the maneuvering or perform any other function other than to lower the legs or raise the legs when ordered so to do. Crescent owed the duty to third parties to exercise reasonable care in navigating this flotilla down the river commensurate with the unusual and extraordinary circumstances that confronted it. Captain Brechtel realized that it was a very hazardous undertaking to pass under the bridge and did turn around and place the tugs downstream to the JULIE ANN so as to push against her upstream in order to have more holding power. However, Crescent had neglicted to furnish sufficient tugs or sufficiently powerful tugs to control and maneuver the barge and her equipment.

Under all the testimony in this case Crescent was negligent in not furnishing sufficient power to hold the JULIE ANN against the current when its legs were being ex-

tended to the required depth of 55 feet. The Crescent had had experience in towing heavy tugs and also had experience in towing two flotillas similar to the one that was being towed on this particular occasion, and it should have known the dangers attendant upon an undertaking like this and should have supplied additional tugs or tugs with more power than the combined power of these tugs. The tug ORLEANS was unable to exert its full power because of a defective engine which failed at the crucial moment. In reaching this conclusion I am not taking into consideration the testimony that when they reached the Baton Rouge bridge Crescent supplied an additional tug for the purpose of safely navigating under that bridge. I excluded this from consideration because it is something that happened after the occurrence at the Natchez Bridge, but after excluding this testimony I find that Crescent knew or should have known that the power was insufficient. Captain Brechtel, who was in complete charge and control of the flotilla, was also guilty of negligence in not completely stopping the flotilla and lowering the legs to a depth of 55 feet before it reached the Natchez bridge. He knew that the current was running 4 or 5 miles an hour and knew that when the spuds were lowered to 55 feet it would be very difficult to control the flotilla because of the increased power of the current propelling the flotilla downstream and should have taken precautions to have had the legs lowered in ample time to have passed under the bridge safely. He was negligent in not making a test of the holding power of the barges with the legs lowered 55 feet when he was some two or three miles upstrea from the bridge. He was negligent in his failure to notify Hughes earlier when to lower the legs and in not stopping immediately after he crossed the rock ledge in order for

Hughes to have lowered the legs to a depth of 55 feet. Hughes exercised reasonable care when he began to lower the legs as soon as he saw and appreciated the danger confronting him and was guilty of no negligence that in any way contributed to the collision.

Under these facts, as a matter of law, the Crescent is liable for all the damages. Many authorities could be cited to sustain this view, but sufficient is the case of The Ames and The Carroll No. 20 and The Edwin Chilton, 66 Fed. (2) 413; The Clarence P. Howland, 16 Fed. (2d) 25.

The second question presented by this record for determination is whether or not the Dixilyn agreed to indemnify Crescent for any and all damages that might be suffered by third parties and, as heretofore stated, Crescent relies upon the second letter of December 23. The evidence and correspondence is clear to the effect that Dixilyn declined so to do and declined to execute the towage release clause resquested by Crescent. Crescent, of course, knew before the refusal of Dixilyn to execute those documents that Dixilyn did not intend to release Crescent from any liability to third parties due to the negligence of Crescent. In order for one to release the other party for damages due to its own negligence, the contract of indemnity must be clear and definite in its terms that such is the intention. Batson-Cook Co. v. Industrial Steel Erectors, 257 Fed. (2) 410; Standard Oil Co. of Texas v. Wampler, 218 Fed. (2) 768; Bisso v. Island Waterways Corpn., 349 U.S. 85.

Since the damages to the bridge flowed from the negligence of Crescent, it is clear under the above authorities that Dixilyn did not indemnify or agree to indemnify Crescent by its letter of December 23. Southwestern Sugar & Molasses Co. v. River Terminal Corpn., 360 U.S. 411,

is not in conflict with Bisso and in no way overturns the holding in the Bisso case. All the authorities cited by Crescent have been given careful study, but are not applicable to the facts of the present case and it would unduly prolong the length of this opinion to undertake to differentiate them. The authorities that have been cited hereinabove are conditioned upon the legal issues presented. The facts as herein stated and the law as herein declared constitute my finding of fact and conclusion of law.

Libelants in the case are entitled to a judgment in the sum of $41,363.24 against the Crescent Towing & Salvage Company, Inc., and the liability of the Crescent Towing & Salvage Company, Inc. is established for that amount. The cross bill of Crescent Towing & Salvage Company will be dismissed.

This, the 5th day of December, 1960.

/s/ S. C. MIZE
United States District Judge